IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17842 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 17842 of 2003

MR SANJANWALA with MR PARESH M DAVE for Petitioner No. 1-2

MR ASIM J PANDYA for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 22/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Mr Asim J Pandya, learned standing counsel waives service of Rule for the respondents.

With the consent of the learned counsel for the parties, the petition is taken up for final disposal

today.

What is challenged in this petition under Article 226 of the Constitution is the order dated 9.5.2003 (Annexure E") passed by the Customs, Excise & Gold (Control) Appellate Tribunal at New Delhi dismissing the petitioners' appeal and confirming the order dated 20.3.2002 (Annexure "D") passed by the Commissioner of Central Excise & Customs (Appeals), Vadodara by which the Commissioner set aside the order dated 29.1.1998 (Annexure "C") of the Assistant Commissioner, Central Excise, Division-I, Mehsana allowing the Modvat credit of Rs.1,92,026/- and discharging the show cause notice dated 26.9.1994.

2. The petitioner-Company is a private limited Company engaged in the business of manufacture of polyester textured yarn. The factory of the Company is closed down for the last several years and the properties of the Company have been taken over by and auctioned by GSFC. In the year 1994-95, the Company was manufacturing textured filament yarn. The yarns were covered under the Proforma Credit Scheme under erstwhile Rule 56A of Central Excise Rules, 1944 and the petitioner-Company was availing the proforma credit benefit as per the said rule. As per the said rule, the petitioner was required to maintain RG-23 Part-I and II register as prescribed under Rule 56A at the relevant time and the yarns purchased and procured by the petitioner-Company and the duties paid thereon were recorded in the said register, whereas the textured yarn produced by the petitioner-Company was recorded in Daily Stock Account i.e. RG-1 register and the duties were paid on such yarns at the time of removal thereof from the factory. On and with effect from 20.5.1994, Rule 56A came to be deleted and Rule 57A came to be inserted providing for Modvat Credit Scheme on yarns w.e.f.20.5.1994. The petitioner-Company accordingly became eligible for Modvat benefit under Rule 57A w.e.f. 20.5.1994 instead of Proforma Credit benefit under erstwhile Rule 56A. The basis Schemes of Proforma Credit under Rule 56A as well as Modvat Credit under Rule 57A were similar and even the registers required to be maintained under the said Schemes were also very similar to each other. Under Rule 56A the petitioner-Company was required to maintain the register in form RG-23 for the Proforma Credit Scheme but under Rule 57A the petitioner-Company was required to maintain the register in form RG-23A Part-I and II for the Modvat Credit Scheme. The petitioners were not aware about the aforesaid change in the rules and the consequential procedural change regarding maintenance of

separate registers. The petitioners, therefore, took credit of duties paid on four consignments of yarns which were received in the petitioners' factory on 23rd May, 24th May, 2nd June and 6th June 1994 and entered the same in register form RG-23 under Rule 56A on the respective dates. Those transactions were also reported to the Range Superintendent while filing returns for the months of May and June 1994. On the basis of the said four transactions, the petitioners took Proforma Credit of Rs.1,92,026/-.

The Assistant Collector of Central Excise, Division-II, Mehsana issued show cause notice dated 26.9.1994 calling upon the petitioners to show cause why the above credit of Rs.1,92,026/- should not be disallowed and recovered along with imposition of penalty as Rule 56A was deleted w.e.f.20.5.1994 and the petitioners had not entered the transactions in register RG-23A Part-I and II.

The petitioners submitted their reply dated 1.8.1995 submitting that there was no misuse of any facility by the petitioners and that the petitioners were a much entitled to Modvat Credit Schemes under Rule 57A as Proforma Credit Schemes under Rule 56A. The petitioners had undisputedly paid Rs.1,92,026/on the inputs received by the petitioners after 20.5.1994 and, therefore, there was nothing wrong in taking credit of this amount. The mistake in making the entries in register form RG-23 instead of making the entries in register form RG-23A after 20.5.1994 was not such a material fact that the petitioners be denied the entire credit. There was substantial compliance with the procedural rules and, therefore, the show cause notice was required to be discharged.

The Assistant Collector accepted the above defence and held that since there was no short levy and there was only a procedural lapse due to change in procedure w.e.f. 20.5.1994 and that the procedural mistake had occurred only for 15 days i.e. from 20.5.1994 to 10.6.1994, denial of Modvat credit was not justified. This view was taken by the Assistant Commissioner in the Order-in-original dated 29.1.1998 at Annexure "C" and the demand raised by the show cause notice was accordingly dropped.

However, the department took the matter in appeal before the Commissioner (Appeals), Vadodara. It appears that the notice sent by the Commissioner (Appeals) was not received by the petitioners because the notice was

probably served on the petitioners' factory which was closed and the factory was taken over by the GSFC. Ultimately, the Commissioner (Appeals) recorded the absence of the petitioners and allowed the appeal on the ground that the Assistant Commissioner had no jurisdiction to condone the lapse of not making the entries in register form RG-23A under Rule 57A and that the credit could not be claimed under Rule 56A which was deleted w.e.f. 20.5.1994. The petitioners, therefore, preferred an appeal before the Appellate Tribunal which confirmed the order of the Commissioner (Appeals). Hence, this petition under Article 226 of the Constitution.

3. Mr Sanjanwala, learned counsel for the petitioners has submitted that when the Assistant Collector held, and the Commissioner (Appeals) or the Tribunal have not held otherwise, that the petitioner-Company was entitled to get the benefit of Modvat credit under Rule 57A for the transactions in question which were admittedly entered into register form RG-23, the petitioner-Company ought not to have been penalised by denying it the benefit of the Modvat scheme.

4. On the other hand, Mr Asim Pandya, learned Addl. Standing Counsel for the Central Government has opposed the petition and submitted that since Rule 56A was deleted w.e.f. 20.5.1994, the petitioner could not have been prompted to take benefit of the Proforma credit entry into the register maintained in under erstwhile Rule 56A.

Mr Pandya further submits that in any view of the matter even if some relief is required to be granted to the petitioners, under the provisions of Rule 173Q the petitioners would be liable to pay penalty for wrongly availing of the credit as indicated hereinabove.

5. Having heard the learned counsel for the parties, we are of the view that when the petitioner was undisputedly entitled to benefit of the Modvat credit under Rule 57A introduced w.e.f. 20.5.1994 (the same date with effect from which Rule 56A for Proforma credit was deleted) and the transactions entered into register form RG-23 were also reported to the concerned Superintendent in the returns filed for the months of May and June 1994, the Assistant Collector did not act without jurisdiction in allowing the petitioners Modvat credit under Rule 57A. Hence, the impugned orders of the Commissioner and the Tribunal deserve to be set aside. At the same time, we do find some substance in the

submission made by Mr Asim Pandya for the authorities that if the authorities go on condoning such procedural lapses it will be difficult, if not impossible, for the department to get compliance with the procedural rules which are also framed with a definite object in mind and, therefore, such rules cannot be allowed to be bypassed without the assessee suffering any detriment whatsoever.

6. It is true that ordinarily we would have remanded the matter to the Assistant Commissioner for considering the question of penalty. However, in view of the fact that the procedural lapse in question took place way back in the year 1994, we are of the view that the interests of justice would be served if we direct the respondents to permit the petitioners to avail of the Modvat credit as granted by the Assistant Collector reduced by an amount of Rs.15,000/- (Rupees Fifteen thousand only).

It is directed accordingly.

7. The petition is accordingly allowed. The impugned order dated 9.5.2003 (Annexure "E") passed by the Tribunal and the order dated 20.3.2002 (Annexure "D") passed by the Commissioner of Central Excise & Customs (Appeals), Vadodara are hereby quashed and set aside. Subject to the modification that the petitioner is liable to pay penalty of Rs.15,000/-, the order of the Assistant Commissioner dated 29.1.1998 (Annexure "C") is restored, that is, the credit of Rs.1,92,026/- taken by the petitioner shall be reduced by Rs.15,000/-.

8. It is clarified that since this order is passed in the peculiar facts of this case, we may not be treated to have held that filing declaration under Rule 57G was not a condition precedent for availing of the Modvat/Cenvat credit.

Rule is made absolute to aforesaid extent with no order as to costs.

(M.S. SHAH, J.)

(A.M.KAPADIA, J.)

zgs/-